1989

State of Utah v. Steven Troy Spann : Brief of Appellee

Utah Supreme Court

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BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 890152
v.	:	
STEVEN TROY SPANN,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF AGGRAVATED ARSON, A FIRST DEGREE FELONY, IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE KENNETH RIGTRUP, JUDGE, PRESIDING.

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction of aggravated arson, a first degree felony, under Utah Code Ann. § 76-6-103(1)(a) (Supp. 1989).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2-2(3)(i) (Supp. 1989).

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

The following issues are presented on appeal:

1. Did the trial court properly deny defendant's motion to quash the jury which was based on defendant's allegation that the prosecutor had exercised a peremptory challenge in a racially discriminatory manner?

2. Was there prosecutorial misconduct at trial that constitutes grounds for reversal of defendant's conviction?

3. Was there sufficient evidence presented at trial to support defendant's conviction?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Relevant text of constitutional and statutory provisions pertinent to the resolution of the issues presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

Defendant, Steven Troy Spann, was charged with aggravated arson, a first degree felony, under Utah Code Ann. § 76-6-103(1) (Supp. 1989) (R. 6). A jury found him guilty as charged (R. 55). The trial court sentenced defendant to the Utah State Prison for a term of five years to life (R. 61).

STATEMENT OF FACTS

Given the issues presented on appeal, a lengthy recitation of the facts is not necessary. Conflicting evidence was presented at trial. The following evidence supports the jury's verdict.

At approximately 3:20 a.m. on November 16, 1988, an intense fire was reported burning in a second floor apartment at 2800 South Adams in Salt Lake County which had recently been rented by Barbara Lee (T. 90-91, 137-47, 156-57, 211-15, 308-09). A team of investigators who examined the scene after the fire had been extinguished concluded that, based on the nature and burn pattern of the fire and evidence that an accelerant had been used to start the fire (e.g., the presence of observable "pour patterns" -- see State v. Nickles, 728 P.2d 123, 126 (Utah 1986)), the fire had been intentionally set (T. 221-272, 282, 285, 296). The team excluded the possibility of an accidental fire (T. 276-77).

Nine days prior to the fire, Ms. Lee, who had been living with defendant for approximately two years and had borne a daughter by him, broke off the relationship with defendant. This upset defendant. Lee moved to her father's house which was adjacent to defendant's residence. On the day of their break-up, Lee heard the windshield on her car being broken, and upon investigating, noticed defendant near the car. Shortly thereafter, defendant initiated a violent argument with Lee at her father's house which resulted in defendant forcibly removing the couple's daughter and returning to his residence with her. Subsequently, defendant moved all of Lee's possessions out of his residence and on to the back porch (T. 309-310, 316, 336-41).

On November 13, 1988, defendant cracked the recently repaired windshield on Lee's car during an argument with her and as she attempted to drive away from his apartment. The next day, Lee, with the help of a male friend named Randy Brown, retrieved her belongings from defendant's porch and began moving into the apartment at 2800 South Adams. During the day of November 15, defendant visited that apartment and in a conversation with Lee discussed the poor security of the apartment (i.e., the locks to the door were not particularly secure). On the evening of the 15th, defendant showed up at Lee's place of employment, a bar. Although the sequence of events is not entirely clear after this point, Randy Brown, who was also at the bar, noticed defendant leave the bar at around 11:00 p.m. Approximately five minutes later, Brown went outside to the parking lot and discovered that the grill and headlights on his truck had been heavily damaged.

Lee later discovered that the taillights on her car, which was parked outside the bar, had also been damaged. Sometime after Brown had returned to the bar from his trip to the parking lot, defendant reappeared at the bar, walked by Brown, and said, "I kicked your headlights out." In reference to Lee, defendant said to Brown, "So you're Barbara's boyfriend?" When Brown answered in the negative and explained that he was just a friend helping out Lee, defendant remarked, "Well, I gave up that shit a long time ago, anyway." Defendant then left the bar (T. 315-16,. 319-22, 344-46, 379-82).

When Lee and Brown left the bar at closing time, Brown noticed defendant in the parking lot. Lee drove in her car with Brown to a restaurant and then accompanied Brown to his residence where she spent the night, due to her fear of defendant (T. 328-31).

At approximately 4:15 a.m. on November 16, Karen Bateman, an acquaintance of defendant's, answered a knock on her door and found defendant there. Defendant told her that he had stopped to say goodbye because he was going home (apparently to Las Vegas). He then said either "Barbara's apartment is in flames," or "I flamed Barbara's apartment." Defendant previously had threatened to blow up Lee's car and to burn her house and her father's house (T. 389-405, 409, 425-26).

SUMMARY OF ARGUMENT

Because defendant failed to meet the standing requirement of Batson v. Kentucky, 476 U.S. 79 (1986), the trial court properly rejected his Batson objection and denied his

motion to quash. Furthermore, his alternative arguments for standing were not raised in the trial court and therefore should not be considered for the first time on appeal. However, even if standing is assumed, arguendo, the court's denial of defendant's motion to quash was proper because defendant failed to present any evidence to establish that Vietnamese-Americans are a cognizable racial group for purposes of equal protection, fair cross-section, or due process analysis.

Defendant fails to establish that the prosecutorial misconduct that occurred in this case constitutes grounds for reversal of his conviction. Therefore, the Court should uphold the trial court's denial of defendant's motion for a mistrial.

Finally, there was sufficient evidence to support defendant's conviction of aggravated arson.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO QUASH THE JURY.

Before the jury in defendant's case was sworn, defendant moved to quash the jury, alleging that under Batson v. Kentucky, 476 U.S. 79 (1986), and State v. Cantu, 750 P.2d 581 (Utah 1988) ("Cantu I"), the prosecutor had impermissibly exercised a peremptory challenge to strike a minority person from the jury venire (T. 62-68).[1] Without defining the term "minority," defendant argued that "minority [persons] are more likely than other members of the citizenry to vote for

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[1] The portion of the transcript relevant to defendant's motion to quash is attached to defendant's brief on appeal as "Appendix 1."

acquittal," and that the prosecutor had exercised, on racial grounds, one of his peremptories to strike a minority from the jury panel, Mr. Viet Phung, who apparently was a Vietnamese-American.[2] The trial court denied defendant's motion on two grounds: (1) that the motion was not timely; and (2) that defendant failed to show he was a member of a cognizable racial group as required by Batson and Cantu I (T. 65, 69).

On appeal, defendant argues that, because he made a prime facie showing that the prosecutor exercised a peremptory challenge on Mr. Phung in a racially discriminatory manner and the prosecutor failed to provide a racially neutral explanation for the challenge, the trial court erred in not granting his motion to quash. He asserts that his motion was timely and that although he and Mr. Phung were not members of the same race, he had standing to challenge the prosecutor's allegedly discriminatory use of a peremptory challenge under the fourteenth amendment equal protection analysis of Batson, the due process analysis of Peters v. Kiff, 407 U.S. 493 (1972) (plurality opinion), and the sixth amendment fair cross-section/impartial jury analysis presented in other case law. Each of these claims will be dealt with in turn.[3]

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[2] The record is not entirely clear regarding Mr. Phung's race. During voir dire, the court's questioning of him was very limited (T. 19). Mr. Phung simply stated that he had graduated from high school in Viet Nam and had been a citizen (presumably of the United States) for about nine years (T. 19).

[3] Although the prosecutor responded to defendant's motion (T. 63-65), that response was not made pursuant to an order of the trial court to provide a racially neutral explanation for the peremptory challenge to Mr. Phung, as is required under Batson and Cantu I once the defendant has made out a prima facie case of

The State agrees that defendant's "Batson" motion was timely.[4] His citation to Utah Code Ann. § 78-46-16 (Supp. 1989) and Utah R. Crim. P. 18 (Utah Code Ann. § 77-35-18 (1982) (repealed effective July 1, 1990)) support his position that his motion, made shortly after the prosecution peremptorily challenged Mr. Phung and before the jury was sworn, was timely.

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[3] Cont. discrimination (see fn. 4, infra at 7). The prosecutor simply was responding with argument to defendant's motion. Therefore, in the event this Court has occasion to do so, the prosecutor's argument cannot fairly be construed as a Batson "explanation" and should not be evaluated as such. If this Court were to determine that, under the circumstances of this case, defendant established a prima facie case such that the prosecutor should be required to provide a racially neutral explanation for his strike of Mr. Phung, the case should be remanded to the trial court for that purpose. See Cantu I, 750 P.2d at 597. However, in light of the arguments that follow, the Court should not have to reach that question.

[4] Defendant's motion to quash, which did not ask the court to require the prosecutor to provide a racially neutral explanation for the peremptory strike of Mr. Phung but instead seemingly requested a quashal solely on the basis that the prosecutor had stricken a "minority" (T. 62-63), was technically incorrect. See Batson, 476 U.S. at 97; Cantu I, 750 P.2d at 595-96 (if the defendant meets the burden of establishing a prima facie case of discrimination, the prosecution must then come forward with a racially neutral reason related to the particular case to be tried to explain the challenge). As noted in Cantu I:

> While a single challenge based on race is impermissible, People v. Brown, 152 Ill.App.3d 996, 1001, 106 Ill.Dec. 91, 94, 505 N.E.2d 397, 400 (1987), the mere fact that the subject of the peremptory strike is a minority member does not alone raise the inference of discriminatory intent. "[I]t is not unconstitutional, without more, to strike one or more [Hispanics] from the jury." Batson, 476 U.S. at 79, 106 S.Ct. at 1725, 90 L.Ed.2d at 91 (White, J., concurring).

750 P.2d at 597 (footnotes omitted). However, this deficiency in the motion, although perhaps an independent ground for affirming the trial court's ruling, becomes relatively insignificant in light of the more basic flaws in defendant's motion which are discussed infra.

See State v. Bankhead, 727 P.2d 216, 217 (Utah 1986) (section 78-46-16(1) requires that any challenge to the jury must be lodged before the jury is sworn); People v. Harris, 542 N.Y.S.2d 411 (A.D. 1989) (to be timely, an objection pursuant to Batson must be made before the jury, or the last juror including alternates, is sworn).

However, defendant's arguments concerning the merits of his motion do not fare as well. First, his claim that Batson can be read to allow any criminal defendant to object to a peremptory strike of a prospective juror who is a member of a cognizable racial group without regard to whether the defendant is also a member of that cognizable racial group, ignores the plain language of Batson. As explained by this Court, under Batson,

> [t]he use of a peremptory challenge solely on the basis of race violates equal protection. The party attacking a peremptory challenge must establish a prima facie case. The burden then shifts to the challenged party to show the existence of a racially neutral reason for the challenge.

State v. Cantu, 778 P.2d 517, 518 (Utah 1989) ("Cantu II"). And,

> [t]o attack a peremptory challenge under Batson, the defendant must establish a prima facie case by showing (1) that he is a member of a cognizable racial group, (2) that the prosecution exercised peremptory challenges to remove from the panel members of the defendant's race, and (3) that all the relevant facts and circumstances raise an inference that the prosecution used its peremptory challenges to exclude the veniremen from the petit jury on account of their race.

Cantu I, 750 P.2d at 595. See Batson, 476 U.S. at 96. Batson, as part of its equal protection analysis under the fourteenth amendment, explicitly requires that the defendant establish a

prima facie case of discrimination by showing, first, that he or she is a member of a cognizable racial group and, second, that the prosecutor struck panel members of the defendant's race. Thus, contrary to the argument defendant made below and now makes on appeal, there must be racial identity between the defendant and the subject of the prosecutor's peremptory challenge for the defendant to have standing to object to the challenge under Batson. In short, to establish an equal protection violation under Batson, membership in the excluded group is a threshold requirement for the defendant. Batson, 476 U.S. at 94. In Cantu I, this Court obviously recognized this requirement when it concluded that the defendant, a Hispanic, had met the first prong of Batson by showing that the panel member was also Hispanic. 750 P.2d at 596.

Although defendant urges the Court to adopt the reasoning of the majority opinion in State v. Superior Court (Maricopa County), 156 Ariz. 512, 753 P.2d 1168 (Ariz. App. 1987), a decision from the Arizona Court of Appeals which rejected a reading of Batson that would require that the defendant be of the same race as the stricken jurors to have standing to object, that reasoning has not been accepted by Arizona's highest court, see State v. Superior Court (Maricopa County), 157 Ariz. 541, 545, 760 P.2d 541, 545 (Ariz. 1988) (en banc),[5] and does not reflect the better reasoned view adopted by

[5] Recognizing the misinterpretation of Batson by the court of appeals, the Arizona Supreme Court, in reviewing that court's decision, chose to analyze the standing issue under the fair cross-section requirement of the sixth amendment, rather than the fourteenth amendment's equal protection clause, and concluded

numerous courts and commentators. See, e.g., State v. Gorman, 315 Md. 402, 554 A.2d 1203, 1209-10 (1989); State v. Superior Court, 157 Ariz. at 545 n.2, 760 P.2d at 545 n.2 (citing cases); Note, Due Process Limits On Prosecutorial Peremptory Challenges, 102 Harv. L. Rev. 1013, 1018 n.37 (1989) (hereafter Note, Peremptory Challenges); Note, Sixth Amendment Reform of Peremptory Challenges -- State v. Superior Court, 157 Ariz. 541, 760 P.2d 541 (1988) (en banc), 21 Ariz. St. L.J. 327, 333 (1989) (hereafter Note, Sixth Amendment Reform of Peremptory Challenges). The major flaw in the majority opinion of the Arizona Court of Appeals in State v. Superior Court is its unjustified application to Batson of Peters v. Kiff, 407 U.S. 493 (1972) (plurality opinion), where Justice Marshall and the two members of the Court who joined his opinion concluded that a white defendant had standing under the Due Process Clause of the fourteenth amendment to challenge the systematic exclusion of blacks from the initial draw for grand and petit juries. Peters, unlike Batson, did not involve peremptory challenges and therefore cannot reasonably be applied to read out of Batson the explicit requirement that the defendant be of the same race as the excluded venireman. See State v. Superior Court, 156 Ariz. at 516-17, 753 P.2d at 1172-73 (Shelley, J., dissenting).

Therefore, under the correct reading of Batson, defendant, who was caucasian (T. 68), did not have standing to object to the prosecution's allegedly discriminatory use of a

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[5] Cont. that a caucasian defendant had standing to object to the prosecution's peremptory challenges to strike black veniremen. 157 Ariz. at 544-46, 760 P.2d at 544-46.

peremptory challenge to strike Mr. Phung, who defendant maintains was a Vietnamese-American. Insofar as the trial court's denial of defendant's motion on the ground that defendant failed to show he was a member of a cognizable racial group can be interpreted as a ruling that defendant and Mr. Phung were not members of the same cognizable racial group as required by Batson, it should be affirmed. Even if it cannot be so interpreted, the court's ruling should be affirmed under the principle that this Court may uphold the trial court's ruling on any proper ground. See State v. Bryan, 709 P.2d 257, 260 (Utah 1985) ("[T]his Court may affirm the trial court's decision on any proper grounds, even though the trial court assigned another reason for its ruling.").

In the alternative, defendant argues that this Court, pursuant to article I, section 24 of the Utah Constitution,[6] could grant any criminal defendant standing to raise a Batson-type equal protection objection without regard to whether the particular defendant is a member of the same cognizable racial group as the excluded venireman. As an initial matter, the Court should not address this alternative argument under the state constitution on the ground that defendant did not raise the argument below. Defendant's argument in the trial court was based solely on Batson and Cantu and the federal constitutional analysis contained therein. It is well settled that in the absence of exceptional circumstances, this Court will not review

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[6] Article I, section 24 of the Utah Constitution provides:

> All laws of a general nature shall have uniform operation.

matters raised for the first time on appeal. State v. Steggell, 660 P.2d 252, 254 (Utah 1983). This rule is equally applicable to constitutional claims raised for the first time on appeal. See, e.g., State v. Van Matre, 777 P.2d 459, 463 (Utah 1989) (refusing to address the defendant's due process claim which was raised for the first time on appeal); State v. Loe, 732 P.2d 115, 117 (Utah 1987) (defendant's constitutional claim, raised for the first time on appeal, would not be reviewed). And, the principle logically applies where the defendant raises a state constitutional argument for the first time on appeal. See State v. Johnson, 771 P.2d 326, 327-28 (Utah Ct. App. 1989) (refusing to address the defendant's state constitutional argument which was not presented to the trial court). Cf. State v. Carter, 707 P.2d 656, 660 (Utah 1985) ("[W]here a defendant fails to assert a particular [constitutional] ground for suppressing unlawfully obtained evidence in the trial court, an appellate court will not consider that ground on appeal).

The foregoing waiver argument is also applicable to defendant's additional arguments regarding due process (citing Peters v. Kiff, 407 U.S. 493 (1972), and article I, section 7 of the Utah Constitution), trial by an impartial jury (citing the sixth amendment analysis of Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985), on remand, 801 F.2d 871 (6th Cir. 1986), cert. denied, 479 U.S. 1046 (1987); article I, section 12 of the Utah Constitution; and various state decisions interpreting state constitutional provisions designed to insure impartial juries through representation of a fair cross-section of the community

on the jury (e.g., People v. Wheeler, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978)), and state and federal jury selection laws (citing 18 U.S.C. § 243 and Utah Code Ann. §§ 78-46-2 and -3 (1987)). See Br. of Appellant at 15-22. None of those arguments was presented to the trial court; therefore, they should not be considered by this Court for the first time on appeal.

However, even if the Court were either to accept defendant's proposed interpretation of Batson (under which he would have standing to raise a Batson objection) or to look past the waiver discussed above and assume, arguendo, that a criminal defendant, regardless of his or her race, has standing under the federal and/or state constitutional guarantees of due process, trial by an impartial jury, and equal protection (as argued alternatively by defendant) to object to the prosecution's allegedly racially discriminatory use of peremptory challenges,[7]

[7] Defendant's statutory arguments are effectively subsumed within his constitutional arguments, in that the statutes he cites merely reflect constitutional guarantees under the federal and state constitutions. See Peters, 407 U.S. at 498 (plurality opinion), at 506-07 (White, J., concurring) (discussing 18 U.S.C. § 243 and its relationship to the fourteenth amendment). Furthermore, with respect to defendant's citations to Utah Code Ann. §§ 78-46-2, -3 and -16 (1987 & Supp. 1989), sections of the Jury Selection and Service Act, this Court in State v. Tillman, 750 P.2d 546, 574 n.115 (Utah 1987), decided that "constitutional challenges to [jury] panels should be brought outside the framework of the Act." This same reasoning logically applies to constitutional challenges to the petit jury selected.

Also, there are clear divisions in the courts on the due process and impartial jury/fair cross-section issues defendant raises. A comparison of the majority and dissenting opinions in the Arizona Court of Appeals case of State v. Superior Court, 156 Ariz. at 514-18, 753 P.2d at 1170-74, well illustrates the opposing views on the applicability of the Supreme Court's decision in Peters to the peremptory challenge issue the Court

the Court would still be obligated to uphold the trial court's

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[7] Cont. later addressed in Batson. Even more distinct is the split on the question of whether the impartial jury/fair cross-section analysis under the sixth amendment is applicable to peremptory challenges. Compare, e.g., State v. Gorman, 315 Md. 402, 554 A.2d 1203, 1210-11 (1989), with Fields v. People, 732 P.2d 1145 (Colo. 1987). See also State v. Bishop, 753 P.2d 439, 456-57 (Utah 1988) (discussing the applicability of sixth amendment fair cross-section analysis to peremptory challenges in light of Batson and Lockhart v. McCree, 476 U.S. 162 (1986)). That issue may soon be resolved by the Supreme Court in Holland v. Illinois, 109 S. Ct. 1309 (1989) (granting certiorari), where the questions presented are: (1) does the State's use of peremptory challenges to exclude Blacks from the trial jury violate the defendant's sixth amendment right to an impartial jury; and (2) does a caucasian defendant have standing to object to the exclusion of Blacks from his jury? See Note, Sixth Amendment Reform of Peremptory Challenges, 21 Ariz. St. L.J. at 345.

Finally, there are serious conceptual problems with defendant's suggestion that an equal protection challenge to allegedly discriminatory use of peremptories by the prosecution is available to a defendant regardless of his or her race. "Under equal protection doctrine the right to be tried before a jury of one's peers is not so clearly undermined where the excluded jurors are not members of the same group as the defendant." Fields, 732 P.2d at 1150. As stated by this Court in Tillman:

> Although fair cross-section claims are in certain respects analogous to discrimination claims under the equal protection clause of the fourteenth amendment, there are significant distinctions which must be observed. See, e.g., Duren, 439 U.S. at 368 n.26, 99 S.Ct. at 670 n.26. For example, because in sixth amendment challenges the focus is on fair cross-section issues and not on the issue of discrimination, a defendant is not required to show bad faith, and a prima facie showing of systematic exclusion may not be rebutted by proof of a nondiscriminatory intent. United States v. Jenison, 485 F.Supp. 655, 660 (S.D.Fla. 1979). Additionally, standing exists regardless of the race or class of a defendant. Duren, 439 U.S. at 359 n.1, 99 S.Ct. at 666 n.1.

750 P.2d at 575 n.126.

denial of defendant's motion to quash.

Under all the analyses defendant proffers on appeal, to prevail on a claim of racial discrimination the defendant must show exclusion of members of a cognizable racial group. See Batson, 476 U.S. at 96 (setting out cognizable racial group requirement in equal protection context); State v. Tillman, 750 P.2d 546, 575 (Utah 1987) ("A prima facie violation of the fair cross-section guarantee is established where a defendant shows: . . . [T]hat the group alleged to be excluded is a "distinctive" group in the community . . . ."") (citing Duren v. Missouri, 439 U.S. 357, 364 (1979)); Peters, 407 U.S. at 503 (plurality opinion) (which talks about exclusion from jury service of "a substantial and identifiable class of citizens" in due process context). Because each of the three analyses--Batson (equal protection), Duren (fair cross-section), and Peters (due process)--views peremptories as potentially harmful only if exercised to eliminate members of discrete groups, they all require proof of cognizability. See Batson, 478 U.S. at 96; Roman v. Abrams, 822 F.2d 214, 227-28 (2d Cir. 1987), cert. denied, 109 S. Ct. 1311 (1989) (recognizing cognizability requirement for sixth amendment impartial jury/fair cross-section analysis of discriminatory use of peremptory challenges);[8]

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[8] See also People v. Wheeler, 22 Cal.3d 258, 148 Cal.Rptr. 890, 902, 583 P.2d 748, 761 (1978) (which recognized the cognizability requirement in holding that, under the representative cross-section requirements of the sixth amendment to the United States Constitution and article I, section 16 of the California Constitution, peremptory challenges could not be used to exclude prospective jurors on the basis of membership in an identifiable group distinguished on racial, religious, ethnic, or similar grounds).

Peters, 407 U.S. at 503. See also Note, Peremptory Challenges, 102 Harv. L. Rev. at 1019-21 (recognizing and then criticizing the cognizability requirement inherent in both equal protection and fair cross-section analyses).[9] Accordingly, defendant was obligated to establish in the trial court that Mr. Phung, apparently a Vietnamese-American, was a member of a cognizable racial group. However, he presented no evidence or argument on that point to the trial court, apparently assuming that Vietnamese-Americans are necessarily a cognizable racial group. His arguments on appeal are based on that same, unsupported assumption.

Although "courts have pointedly disagreed upon the proper standard to apply in determining cognizability under Batson and have struggled repeatedly in deciding whether a particular classification satisfies the cognizability standards," Note, Peremptory Challenges, 102 Harv. L. Rev. at 1020 (footnotes omitted), something more than the assumption upon which defendant proceeds in the instant case is required. A brief overview of the law in this area and this Court's treatment of the cognizability issue will illustrate this point.

This Court first had occasion to address the cognizable or distinct group question in a pair of capital murder cases --

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[9] Because defendant does not argue for a different analysis of the cognizability requirement under the state constitutional provisions he cites, this Court should not consider that issue. See State v. Lafferty, 749 P.2d 1239, 1247 n.5 (Utah 1988) ("As a general rule, we will not engage in a state constitutional analysis unless an argument for different analyses under the state and federal constitutions are briefed."). Accordingly, the State will not address it.

State v. Bishop, 753 P.2d 439, 457 (Utah 1988), and State v. Tillman, 750 P.2d 546, 573-77 (Utah 1987). The Court's analysis in Tillman was made applicable to both defendants. Bishop, 753 P.2d at 457. There, the defendants argued that the panels from which their juries were selected did not contain a fair cross-section of the community because "using voter registration lists as the exclusive source of selecting potential jurors leads to the systematic underrepresentation of racial and ethnic minorities, particularly Hispanics, on panels in Salt Lake County." Tillman, 750 P.2d at 573. In addressing that argument, the Court stated:

> The sixth amendment to the United States Constitution guarantees an accused trial by an impartial jury. The fourteenth amendment to the United States Constitution incorporates the sixth amendment's fair trial guarantees and makes them applicable to the states. The selection of petit juries from a representative cross-section of the community is an essential component of the sixth amendment's right to a jury trial.
>
> The use of voter registration lists as the sole source of obtaining prospective jurors is not impermissible absent a showing of some impropriety in the process. For example, such "impropriety" might be demonstrated if those lists resulted in the systematic exclusion of a cognizable group or class of citizens or if there was discrimination in the compilation of such lists. Moreover, while jurors must be drawn from a source fairly representative of the community, each jury need not "mirror" the community: "Defendants are not entitled to a jury of any particular composition."

Id. at 574-75 (footnote citations omitted). Noting that one component of establishing a prima facie violation of the fair cross-section guarantee is "that the group alleged to be excluded

is a 'distinctive' group in the community," id. at 575 (citing Duren v. Missouri, 439 U.S. 357, 364 (1979)), the Court stated:

> Although Bishop claimed that all racial and ethnic minorities were excluded from Salt Lake County venires, defendants focus on appeal upon Hispanics. Bishop contends that Hispanics are distinctive because they are designated in a separate category in census figures and because they are "segregated by religion, economic status and cultural background from the majority of county residents." Similarly, the State would have us assume that Hispanics are a distinctive group for fair cross-section purposes. We believe such an assumption is too hastily made. For purposes of the equal protection clause, Hispanics may be a distinctive group. But it does not necessarily follow that they are distinctive in Salt Lake County for fair cross-section purposes.
>
> Bishop relies upon People v. Harris, wherein the California Supreme Court found that Hispanics were a distinctive group for purposes of fair cross-section analysis. However, Harris is not persuasive on this point. Taylor v. Louisiana and Duren v. Missouri note that a particular group must be of sufficient numerosity and distinctiveness to be cognizable for fair cross-section purposes. This standard certainly implies a factual determination which turns upon the relevant characteristics of the particular community. Therefore, although Hispanics may be a distinctive group in California for purposes of the sixth amendment, it does not follow that they constitute such a group in Utah.

Id. at 575-76 (footnotes and footnote citations omitted). The Court then concluded that the failure of both Bishop and Tillman to offer any evidence to support their claim that Hispanics are a distinctive group in Salt Lake County was fatal to their sixth amendment claim. Id. at 576. For precisely the same reason, defendant's sixth amendment argument, although made in a slightly different context, must fail. He did not present to the trial

court, and does not offer on appeal, any evidence to establish that Vietnamese-Americans are a distinctive group in Salt Lake County, the location of his trial. See also United States v. Sgro, 816 F.2d 30, 33 (1st Cir. 1987), cert. denied, 484 U.S. 1063 (1988).

This Court seemingly has taken a somewhat different approach with respect to the Batson equal protection analysis under the fourteenth amendment. In Tillman, the Court, citing Hernandez v. Texas, 347 U.S. 475, 479-80 (1954), observed that "[f]or purposes of the equal protection clause, Hispanics may be a distinctive group." 750 P.2d at 575. However, in a footnote, the Court qualified this by adding that "[e]ven the Court in Hernandez warned that whether such a group did in fact exist was a question of fact in any given community." Id. at 575 n.125 (citing Hernandez, 347 U.S. at 478). Nevertheless, in Cantu I, when confronted directly with the question in the Batson context, the Court simply stated, in conclusionary fashion, that "Hispanics or Spanish-surnamed persons are a 'cognizable racial group' for purposes of equal protection analysis under Batson." Cantu I, 750 P.2d at 596 (footnote omitted) (citing Castaneda v. Partida, 430 U.S. 482 (1977); and Fields v. People, 732 P.2d 1145 (Colo. 1987)). Cf. U.S. v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987) (stating, without discussion, that Native Americans are a cognizable racial group). The Court made no reference to footnote 125 in Tillman, 750 P.2d at 575 n.125, where it had noted the warning in Hernandez that whether a distinctive group actually exists is a question of fact in any particular

community. Given the Court's general citation to Castaneda, it apparently found the following language from that case controlling, notwithstanding the Hernandez warning: "[I]t is no longer open to dispute that Mexican-Americans are a clearly identifiable class." 430 U.S. at 495 (citing Hernandez).

However, the Court's additional citation to Fields, the Colorado case, is somewhat confusing. In Fields, the issue decided by the Colorado Supreme Court was "whether the prosecution's use of peremptory challenges violated the defendant's right to a trial by an impartial jury under the sixth amendment to the federal constitution and article II, section 16 of the Colorado Constitution." 732 P.2d at 1151. In holding that "Spanish-surnamed people are a cognizable group for purposes of determining whether a defendant has been denied the opportunity for a jury composed of a fair cross-section of the community" and that "a prosecutor's use of peremptory challenges systematically to exclude Spanish-surnamed persons from the jury deprives a defendant of the right to trial by an impartial jury guaranteed by the sixth amendment and . . . the Colorado Constitution," id. at 1146, 1153, the court specifically adopted the sixth amendment fair cross-section standard for determining cognizability that the California Supreme Court set forth in People v. Wheeler -- i.e., "a group is legally cognizable if it is defined on the basis of race, national origin, religion or sex." Id. at 1153 & n.15. Therefore, the Cantu I Court's reliance on Fields as support for its conclusion that "Hispanics or Spanish-surnamed persons are a 'cognizable racial group' for

equal protection analysis under Batson," 750 P.2d at 596, is both misplaced and directly contrary to its footnote in that same case where it "reserve[d] judgment on whether Hispanics are a distinctive group under sixth amendment fair cross-section analysis," id. at 596 n.3 (citing State v. Tillman, 750 P.2d 546 (Utah 1987)).

The absence in Cantu I of a clear statement of the standard to be applied in determining cognizability under Batson, coupled with the Court's seemingly inconsistent citations to Castaneda and Fields, is troublesome. The Cantu II Court's subsequent citation to and apparent approval of the elements of a prima facie case of bias enunciated in People v. Wheeler -- which include "a showing that persons excluded belong to a cognizable group under the representative cross-section rule" -- compounds the problem. See 778 P.2d at 518. This ambiguity in the Court's Batson case law requires clarification.

As previously noted, the courts have pointedly disagreed upon the proper standard to apply in determining cognizability under Batson. Note, Peremptory Challenges, 102 Harv. L. Rev. at 1020. At least one court has borrowed the guidelines for sixth amendment analysis developed in Duren v. Missouri, 439 U.S. 357 (1979). See United States v. Sgro, 816 F.2d 30, 33 (1st Cir. 1987), cert. denied, 484 U.S. 1063 (1988). In Sgro, the court, in deciding that the defendant had failed to demonstrate that "the undefined designation 'persons bearing Italian-American surnames,' or even the designation 'Italian-American' meets the test promulgated by Duren . . . to establish

a constitutionally cognizable class," 816 F.2d at 33 (footnote omitted), stated:

> For a defendant to establish a prima facie case of purposeful discrimination in the selection of the petit jury, based solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial, the defendant first must show that he is a member of a cognizable racial group. Batson, 106 S.Ct. at 1722-1723; Castaneda v. Partida, 430 U.S. 482, 492, 97 S.Ct. 1272, 1279, 51 L.Ed.2d 498 (1977).

Ibid. It further observed:

> [T]he standard that must be met to establish that a group is constitutionally cognizable is no longer subject to question. See Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979); Barber v. Ponte, 772 F.2d 982, 997 (1st Cir. 1985) (en banc). The proponent must prove that (1) the group must be definable and limited by some clearly identifiable factor, (2) a common thread of attitudes, ideas or experiences must run through the group, and (3) there must exist a community of interest among the members, such that the group's interest cannot be adequately represented if the group is excluded from the jury selection process.

Ibid. However, this approach was criticized in United States v. Biaggi, 673 F.Supp. 96 (E.D.N.Y. 1987), aff'd, 853 F.2d 89 (2d Cir. 1988), cert. denied, 109 S. Ct. 1312 (1989):

> In order to satisfy the first prong of the Batson three-part test, it must be shown that Italian-Americans constitute a "cognizable racial group." Batson, 106 S.Ct. at 1723. The standard for determining cognizability for equal protection objections to peremptory challenges during jury selection under Batson is the one set out in Castenada v. Partida, 430 U.S. 482, 494, 97 S.Ct. 1272, 1274, 51 L.Ed.2d 498 (1977), as is clear from the Batson Court's direct citation to Castaneda. See Batson, 106 S.Ct. at 1723. This standard defines as cognizable any group that is "a recognizable, distinct class, singled out for different treatment under the laws, as

written or as applied." Castaneda, 430 U.S. at 494, 97 S.Ct. at 1274. See also United States v. Dennis, 804 F.2d 1208, 1210 (11th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1973, 95 L.Ed.2d 814 (1987), (applying Castaneda test to Batson analysis).

The government urges that, instead of following Castaneda, the court should adopt the reasoning of the First Circuit in United States v. Sgro, 816 F.2d 30 (1st Cir. 1987), which found the evidence insufficient to establish that Italian-Americans are a "cognizable racial group" under Batson. There the First Circuit chose to borrow the cognizability standard developed for the Sixth Amendment requirement that the jury venire represent a fair cross-section of the population. See Sgro, 816 F.2d at 33 (employing the characteristics outlined in Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), and Barber v. Ponte, 772 F.2d 982, 997 (1st Cir. 1985) (en banc)). The Sgro court's borrowing act is initially suspect because the Supreme Court in Batson quite clearly commanded that Castaneda govern its own use of the term "cognizable racial group." See Batson, 106 S.Ct. at 1723.

Furthermore, there is an important difference between the meaning of cognizability in these two different contexts. Discrimination against a group in the cross-section of the venire, in violation of the Sixth Amendment, may be demonstrated by mere statistical underrepresentation of that group. See Duren, 439 U.S. at 368 n.26, 99 S.Ct. at 670 n.26. Discrimination in the use of peremptory challenges in violation of the equal protection clause, by contrast, necessitates a showing of the "essential element" of "discriminatory purpose." Id.; see Batson, 106 S.Ct. at 1723-24. Because discrimination in the venire under the Sixth Amendment may be statistical, the definition of a "cognizable group" must be narrowly drawn lest any group imaginable by defense counsel be found numerically underrepresented. See Barber, 772 F.2d at 999 (en banc) (warning that "blue-collar workers, yuppies, Rotarians, Eagle Scouts, and an endless variety of other classifications" could receive protection).

> Because the guarantee against discrimination through peremptory challenges requires a showing of purpose, "cognizable racial groups" may be defined less rigidly, for it is precisely the evidence of intentional exclusion of the group that helps to identify the group. The First Circuit itself made this distinction clear:
>
> > That is not to say, however, that if a classification were specifically and systematically excluded from jury duty the same standard would be used as here, where defendant simply relies on a statistical disparity in the venire to challenge its constitutionality [under the fair cross-section rule]. If certain people are specifically and systematically excluded from jury duty, then the jury-administrating authority would have created its own group.
>
> Barber, 772 F.2d at 999-1000 (en banc) (emphasis in original).

673 F.Supp. at 99-100.

Recognizing, nevertheless, that Sgro's criteria are useful, the Biaggi court identified numerous common characteristics of Italian-Americans (many of which were judicially noticed) and concluded that under those criteria, Italian-Americans are a cognizable group. Id. at 100-01. Additionally, it concluded that "[a]lternatively, Italian-Americans are a 'cognizable racial group' under the less restrictive Castaneda standard more properly applied to the present Batson inquiry into purposeful discrimination by peremptory challenges." Id. at 101. The court observed that "Italian-Americans are 'recognizable' and 'distinct,' and appear to have been 'singled out for different treatment under the laws,

as written or applied.'" Ibid. (citing Castaneda, 430 U.S. at 494.)

Sgro and Biaggi illustrate the difficulties that are created by the absence of a clear standard in this Court's case law for determining cognizability under the equal protection analysis of Batson. Although the distinctions between the cognizability standard for purposes of fair cross-section analysis and the cognizability standard for equal protection analysis are perhaps not that pronounced, this Court clearly recognized the distinctions in Tillman and emphasized the importance of observing them. Tillman, 750 P.2d at 575. Thus, it is incumbent upon the Court to be more precise as to the cognizability standard that is applicable to a Batson challenge than it was in Cantu I and Cantu II. For Batson equal protection analysis, the Biaggi court appears to be correct in concluding that the standard set forth in Castaneda, which was specifically cited in Batson, 476 U.S. at 94, is more appropriately applied. The State recognizes that the Castaneda test of cognizability is less restrictive (and, therefore, more easily met by the defendant) than is the Duren test of cognizability. See Tillman, 750 P.2d at 575-76; Biaggi, 673 F.Supp. at 101.

With the foregoing in mind, this Court need only determine whether defendant has demonstrated that Vietnamese-Americans are a cognizable racial group for purposes of Batson's equal protection analysis. Although it might be argued that Vietnamese-Americans are no less cognizable than other racial groups who have already been recognized as cognizable for equal

protection purposes,[10] defendant has offered nothing to establish this fact, either in the trial court or in this Court. Cf. Biaggi, 673 F.Supp. at 100-01. He simply assumes that Vietnamese-Americans are cognizable. "At the very least, a party seeking to invoke Batson must sketch out a fact-based prima facia showing of cognizability . . .," Sgro, 816 F.2d at 33, whether that be in the Castaneda sense or the Duren sense. In short, because defendant entirely failed to meet even this minimal burden below, the trial court's order denying his motion was proper. See State v. Bryan, 709 P.2d at 260 (Court may uphold the trial court's decision on any proper ground).[11]

To summarize, defendant, who is white, did not have standing under Batson to raise an equal protection challenge to an allegedly discriminatory peremptory strike of a prospective juror who apparently was a Vietnamese-American. Because defendant did not raise in the trial court his alternative constitutional arguments in support of his standing claim (i.e., the impartial jury/fair cross-section and due process analyses), the Court should not consider them for the first time on appeal. But, even if the Court were to assume, arguendo, that defendant has standing under his proposed interpretation of Batson or on

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[10] See, e.g., Castaneda, 430 U.S. at 495 (Mexican-Americans are cognizable); Roman v. Abrams, 822 F.2d 214 (2d Cir. 1987) (white persons constitute a cognizable group), cert. denied, 109 S. Ct. 1311 (1989); United States v. Chalan, 812 F.2d 1302, 1313-14 (10th Cir. 1987) (summarily finding American Indians to be a cognizable group under Batson).

[11] For the same reasons, defendant has failed to meet the cognizability requirement of Peters's due process analysis, even though that requirement was stated in a slightly different manner than were similar requirements in Castaneda and Duren.

one or more of the alternative constitutional bases he offers, defendant fails to satisfy the cognizability requirements (associated with the excluded group) that are inherent in each approach. For all these reasons, the Court should uphold the trial court's denial of defendant's motion to quash.

POINT II

DEFENDANT IS NOT ENTITLED TO REVERSAL OF HIS CONVICTION FOR ALLEGED PROSECUTORIAL MISCONDUCT.

Defendant argues that the prosecutor was guilty of misconduct that requires reversal of his conviction under the authority of State v. Ubaldi, 462 A.2d 1001 (Conn. 1983), or, alternatively, under this Court's case law regarding prosecutorial misconduct, see, e.g., State v. Tucker, 727 P.2d 185, 187 (Utah 1986). Defendant contends that the prosecutor deliberately violated the trial court's order, made during an unrecorded side bar conference, that the prosecutor was not to question one of the State's witnesses, Grant Hodson, who was the landlord at the apartment complex where the fire occurred, about whether Hodson was a suspect in the fire. The record is not entirely clear as to the basis for the court's ruling on the evidence, but the court apparently prohibited inquiry either on relevancy grounds (see Utah R. Evid. 401) or on grounds of undue prejudice (see Utah R. Evid. 403).[12] Nor, contrary to defendant's assertion, is the record entirely clear on the question of whether the prosecutor deliberately violated the

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[12] The correctness of this ruling is not critical to the resolution of the prosecutorial misconduct issue.

court's order, in that the prosecutor did express possible misunderstanding of the side bar ruling -- a statement that was not challenged by the court (T. 418-19). What is clear, however, is that the prosecutor did violate the court's order restricting the scope of the prosecutor's examination of Mr. Hodson (T. 417-19).

In arguing for reversal under the circumstances presented, defendant first urges the Court to apply the automatic reversal rule applied by the Connecticut Supreme Court in Ubaldi, 462 A.2d at 1005-11. There, the court had before it the questions of whether it "should grant a new trial in order to deter prosecutorial misconduct which deliberately circumvents trial court rulings and, if so, whether such authority should be exercised in the circumstances presented." 462 A.2d at 1008. Specifically, the prosecutor, in closing argument, had commented on the defendant's failure to produce a witness who could not be called to testify because the court had earlier ruled that the witness had validly invoked his fifth amendment right to remain silent. Id. at 1010. The prosecutor's reference to the witness obviously "implied an association of the defendant with a person who had been identified as a 'bookie,'" which, in the context of the case, was highly prejudicial to the defendant. Ibid. The court noted:

> The prosecutor's argument to the jury was improper both because the inference sought was clearly impermissible and because it demonstrated a complete disregard for the tribunal's rulings. The record of the proceedings affords no reasonable inference that the remark of an experienced prosecutor was inadvertent . . . .

Id. at 1007. Recognizing that "[u]psetting a criminal conviction is a drastic step, but . . . is the only feasible deterrent to flagrant prosecutorial misconduct in defiance of a trial court ruling," id. at 1009 (emphasis added), the court declined to apply the usual prejudice/fair trial standard of review for prosecutorial misconduct and, under the particular circumstances presented, applied a deterrence-oriented automatic reversal rule to the case at bar. Id. at 1006, 1009-10. In reaching its decision, the court noted the following important factors:

> The trial court did not rebuke or admonish the prosecutor upon the defendant's objection to the improper argument. The trial court's general charge to the jury which included the standard instruction relating to the state's burden of proof and the defendant's right to remain silent, cannot reasonably be viewed as obviating the harmfulness of the prosecutor's remarks. Nor [was] the failure of the defendant to request a curative instruction in addition to a mistrial . . . fatal to his claim where deliberate prosecutorial misconduct was met by the trial court's silence in response to a proper objection during summation.

Id. at 1010 (citations omitted). It concluded by stating:

> Where a prosecutor in argument interjects remarks deliberately intended to undermine the ruling of the trial court to the prejudice of the defendant, his conduct is so offensive to the sound administration of justice that only a new trial can effectively prevent such assault on the integrity of the tribunal.

Id. at 1011.

In many respects the Ubaldi reasoning is quite appealing. However, its approach is contrary to the approach traditionally taken by this Court in addressing prosecutorial misconduct claims, which require a showing of prejudice when

misconduct is established. See, e.g., State v. Thomas, 777 P.2d 445, 447 (Utah 1989); State v. Thompson, 776 P.2d 48, 50-51 (Utah 1989); State v. Lafferty, 749 P.2d 1239, 1255 (Utah 1988). Although some of this Court's decisions could be read as suggesting that a different standard might apply to intentional prosecutorial misconduct, see, e.g., State v. Tucker, 709 P.2d 313, 316 (Utah 1985) (citing State v. Wiswell, 639 P.2d 146 (Utah 1981)), the Court's opinion in State v. Troy, 688 P.2d 483 (Utah 1984), appears to indicate otherwise. In Troy, the prosecutorial misconduct was plainly characterized as intentional, yet the Court applied the traditional prejudice test before deciding to reverse the defendant's conviction. 688 P.2d at 486-87. It may be that this Court has implicitly adopted the view that "society should not bear the burden of a new trial because of prosecutorial misconduct where a new trial is not . . . mandated" by sufficient prejudice to the defendant and that "the evil of overzealous prosecutors is more appropriately combatted through contempt sanctions, disciplinary boards or other means." Ubaldi, 462 A.2d at 1009 (discussing position and authorities contrary to the position adopted by the court).

In any event, whether this Court should follow Ubaldi if presented with facts similar to those presented there need not be decided in the context of the instant case. The flagrant prosecutorial misconduct, coupled with inadequate court response, present in Ubaldi simply does not exist in defendant's case. Although defendant doubts the prosecutor's sincerity, the prosecutor, apparently to the satisfaction of the trial court,

maintained that his violation of the court's ruling was not intentional (T. 419). Furthermore, the court here, unlike the trial court in Ubaldi, took prompt ameliorative action by sustaining defendant's objection to the improper question posed to Mr. Hudson and striking Hodson's answer with an admonition to the jury to disregard it (T. 414). See Tucker, 709 P.2d at 316. Indeed, the court noted its ameliorative actions in denying defendant's motion for a mistrial (T. 417). Finally, and perhaps most importantly, after the mistrial was denied, defendant's counsel asked Mr. Hodson the following question on cross-examination: "Mr. Hodson, you've never been questioned as a suspect in this fire, have you?" (T. 422-23.) That question, although not as direct as the prosecutor's "Did you start that fire?" (T. 414), plainly explores the very same subject matter that defendant argues the prosecutor impermissibly inquired into in flagrant violation of the court's ruling. Given this, defendant is not in a position to claim reversible error under either the Ubaldi standard or the standard of review traditionally applied by this Court. See Tillman, 750 P.2d at 560-61.

The foregoing discussion effectively disposes of defendant's alternative argument that "under traditional analysis, the trial court abused its discretion in denying appellant's motion for a mistrial based on the prosecutor's misconduct." Br. of Appellant at 34-35 (footnote omitted). In State v. Speer, 750 P.2d 186 (Utah 1988), this Court said:

> In reviewing a claim of prosecutorial misconduct, we must determine if the

> prosecutor's remarks calls [sic] to the attention of the jurors matters they would not be justified in considering in reaching the verdict and, if so, whether there is a reasonable likelihood that the misconduct so prejudiced the jury that there would have been a more favorable result absent the misconduct. State v. Tillman, ___ P.2d ___, 72 Utah Adv. Rep. 6 (Dec. 22, 1987); State v. Fisher, 680 P.2d 35, 36 (Utah 1984). In determining whether a remark or question by the prosecution had such an effect, the alleged misconduct must be viewed in light of the totality of the trial. No one is in a more advantageous position to view the incident in the context of the trial than the trial judge; therefore, his ruling on whether the conduct of the prosecution warranted a mistrial will not be overturned absent an abuse of discretion. State v. Hodges, 30 Utah 2d 367, 370 517 P.2d 1322, 1324 (1974).

750 P.2d at 190. In the context of the entire trial, the prosecutor's question which is challenged by defendant was not that significant. Any prejudice it may have created for defendant was significantly diminished by defense counsel's questioning of Mr. Hodson on the same subject matter. And, as discussed in Point III of this brief, there was substantial evidence of defendant's guilt, which lessened the possibility that the jury was influenced by the prosecutor's misconduct. See State v. Troy, 688 P.2d at 486 ("If proof of defendant's guilt is strong, the challenged conduct or remark will not be presumed prejudicial.") (quoting State v. Seeger, 4 Or.App. 336, 479 P.2d 240 (1971)). Finally, the prompt ameliorative actions by the court upon defendant's objection further obviated any harm that might have resulted to defendant. See Tucker, 709 P.2d at 316. Accordingly, under the abuse of discretion standard enunciated in Speer, the court's denial of defendant's motion for a mistrial should be upheld.

POINT III

THERE WAS SUFFICIENT EVIDENCE PRESENTED AT TRIAL TO SUPPORT DEFENDANT'S CONVICTION.

Defendant argues that the evidence presented at trial was insufficient to support the jury's findings that an arson was committed and that defendant committed it.

In State v. Booker, 709 P.2d 342 (Utah 1985), the Utah Supreme Court set out the well established standard for appellate review of the sufficiency of evidence to support a jury verdict in a criminal case. It stated:

> [W]e review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.
>
> In reviewing the conviction, we do not substitute our judgment for that of the jury. "It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses . . . ." . . . So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops. . . .

709 P.2d at 345 (citations omitted). Additionally, on conflicting evidence, the Court is obliged to accept that version of the facts which supports the verdict; the existence of contradictory evidence or of conflicting inferences does not warrant disturbing the jury's verdict. State v. Howell, 649 P.2d 91, 97 (Utah 1982). "Nor is it [the Court's] function to

determine guilt or innocence or the . . . credibility of conflicting evidence and the reasonable inferences to be drawn therefrom." State v. Watts, 675 P.2d 566, 568 (Utah 1983). Circumstantial evidence alone may support a conviction. State v. Nickles, 728 P.2d 123, 126 (Utah 1986) (upholding arson convictions).

When the evidence presented at trial in support of defendant's conviction (as summarized in this brief's statement of facts) is viewed in light of the foregoing standards, it clearly was legally sufficient, even though primarily circumstantial. Defendant's attack on the sufficiency of the evidence is little more than a request that this Court ignore substantial direct and circumstantial evidence that supports his conviction and instead to accept his speculation as to what occurred on the night of the crime. Clearly, that is not the function of this Court in reviewing the sufficiency of the evidence.

CONCLUSION

Based upon the foregoing arguments, defendant's conviction should be affirmed.

RESPECTFULLY submitted this 11th day of January, 1990.

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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Brooke C. Wells and Elizabeth Holbrook, Attorneys for Appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 11th day of January, 1990.

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